

FEDERAL COURT OF AUSTRALIA

Pham v Minister for Home Affairs [2021] FCA 7

Appeal from: *Pham v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 718

File number: NSD 429 of 2021

Judgment of: **YATES J**

Date of judgment: 18 January 2022

Catchwords: **MIGRATION** – appeal from a judgment of the Federal Circuit Court of Australia seeking judicial review of a decision of the Administrative Appeals Tribunal affirming a decision of the delegate not to grant a Partner (Residence) (Class BS) visa – whether the Tribunal had an active intellectual engagement with statutory declarations in support of the appellant

Legislation: *Migration Act 1958* (Cth) s 5F
Migration Regulations 1994 (Cth) cl 801.221(2), reg 1.15A

Cases cited: *He v Minister for Immigration and Border Protection* [2017] FCAFC 206; 255 FCR 41
Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 755
Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1879

Division: General Division

Registry: New South Wales

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 80

Date of hearing: 19 October 2021

Counsel for the Appellant: Mr N Poynder

Solicitor for the Appellant: DNG Lawyers & Migration

Counsel for the First Respondent: Ms K Hooper

Solicitor for the First
Respondent:

Mills Oakley

Counsel for the Second
Respondent:

The Second Respondent filed a submitting appearance

ORDERS

NSD 429 of 2021

BETWEEN: **THI BAO NGOC PHAM**
 Appellant

AND: **MINISTER FOR HOME AFFAIRS**
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: YATES J

DATE OF ORDER: 18 JANUARY 2022

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 The appellant’s application for a Partner (Residence) (Class BS) visa was refused by a delegate of the first respondent (the **Minister**). She applied to the second respondent (the **Tribunal**), for a review of that decision. Following that review, the Tribunal affirmed the delegate’s decision.

2 The appellant sought judicial review of the Tribunal’s decision in the (then) Federal Circuit Court of Australia (the **Federal Circuit Court**). This review was unsuccessful and, on 13 April 2021, the Federal Circuit Court dismissed the application, with costs.

3 The appellant now appeals from that judgment.

RELEVANT LEGISLATION

4 The appellant applied for the visa on 4 November 2013. At that time, Class BS contained only one subclass—Subclass 801 Partner (Residence). The criteria for this visa are set out in Pt 801 of Sch 2 to the *Migration Regulations 1994* (Cth) (the **Regulations**).

5 Subclause 801.221(2) is relevant to the appellant’s application:

- (2) An applicant meets the requirements of this subclause if:
 - (a) the applicant is the holder of a Subclass 820 visa; and
 - (b) the applicant continues to be sponsored for the grant of the Subclass 820 (Partner) visa by:
 - (i) the sponsoring partner; or
 - (ii) the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa; and
 - (c) the applicant is the spouse or de facto partner of the sponsoring partner; and
 - (d) subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.

6 The appellant and her sponsoring partner were married on 12 October 2013. Her visa application was, therefore, based on the existence of her spousal relationship with her husband.

7 7 Section 5F of the *Migration Act 1958* (Cth) (the **Act**) provides:

- (1) For the purposes of this Act, a person is the *spouse* of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a *married relationship* if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

Note: Section 12 also affects the determination of whether the condition in paragraph (2)(a) of this section exists.

8 8 Regulation 1.15A provides:

- (1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

- (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children, and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

THE TRIBUNAL'S DECISION

9 The Tribunal accepted that the appellant and her husband were married to each other under a marriage that was valid for the purposes of the Act. The question before the Tribunal was whether the other requirements of s 5F(2) were met.

10 Amongst other material, the appellant supported her visa application with a number of statements and statutory declarations.

11 Leaving to one side declarations provided by the appellant and her husband, two declarations (from the appellant's cousin and the husband's sister) were provided at the time the appellant made her visa application. These are noted at T[10] of the Tribunal's Decision Record.

- 12 12 After the appellant was granted a Partner (Temporary) Subclass 820 visa (the precursor to the grant of a Partner (Residence) Class BS visa), the appellant submitted a further six declarations: declarations from the appellant and her husband; an updated declaration from the appellant's cousin; a declaration from her mother-in-law; and two declarations from friends. These are noted at T[12] of the Decision Record.
- 13 13 On 28 August 2017, the Department of Immigration and Border Protection received an anonymous allegation that the appellant had entered into a contrived relationship with the sponsor for the sole purpose of gaining entry to Australia; that the appellant was a lesbian who had paid her husband to sponsor her; and that the appellant intends to enter into another contrived relationship as a sponsor to recoup her initial investment. The appellant was informed of the substance of the allegation and invited to comment.
- 14 14 The appellant responded by providing a declaration from the appellant and a declaration from the appellant's husband. The Tribunal said:
14. ... The parties deny the allegations completely and reiterate that they are in a genuine and continuing spousal relationship. They deny that the applicant is a lesbian or that she paid the sponsor to sponsor her for the application.
- 15 15 Before the Tribunal, the appellant provided a further eight declarations and a letter of support (which the Tribunal treated as a declaration). They are noted at T[18] of the Decision Record. The letter of support and seven of the declarations were from persons who said that they were friends or acquaintances of the appellant and/or the appellant's husband. The eighth declaration was a further declaration from the husband's sister (the **sister's declaration**). The Tribunal recorded (at T[18]) that these and other documents (noted by the Tribunal) were provided as "further evidence to support the existence of a genuine and ongoing relationship" between the appellant and her husband.
- 16 16 As to these, the Tribunal said:
18. ... Numerous of these friends state that they are aware of the allegations made in this application [referring to the allegations that the appellant was a lesbian and in a contrived relationship with her husband] and attest that they are not true and that applicant and sponsor are a genuine couple in an ongoing and committed relationship.
- 17 17 Obviously enough, in making this statement, the Tribunal was not endeavouring to detail the contents of the documents. It was simply describing their tenor.

18 18 The appellant appeared before the Tribunal on 23 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the appellant’s husband. The Tribunal provided a detailed account of this evidence at T[19] – T[41] of its Decision Record.

19 19 In its Decision Record, the Tribunal also noted the relevant legislative provisions: [4] – [8] above. It recorded its understanding, based on *He v Minister for Immigration and Border Protection* [2017] FCAFC 206; 255 FCR 41 (*He*), that it needed to consider each of the specific matters in reg 1.15A(3) as if each were a question that must be answered.

20 20 With this in mind, the Tribunal then turned to consider the financial aspects of the relationship (T[51] – T[52]); the nature of the household (T[53] – T[55]); the social aspects of the relationship (T[56] – T[57]); the nature of the appellant’s and her husband’s commitment to each other (T[58]); and other circumstances of the relationship (T[59] – T[62]).

21 21 When considering the social aspects of the relationship, the Tribunal said that it had considered the evidence before it on this topic. It specifically noted some of the declarations to which I have referred at [11] and [12] above. It also referred, in general terms, to photographs which had been submitted showing the appellant and her husband in various contexts as a couple and socialising with friends and family. The Tribunal said:

56. ... The Tribunal accepts that evidence indicating the applicant and sponsor are known as a couple and have presented as such to friends and family since their marriage has been provided.

22 22 In this paragraph, the Tribunal was not intending to detail each of the declarations directed to this topic. It specifically chose the word “including” when identifying some of the declarations. It did not refer specifically to the eight declarations and the letter of support noted at [15] above. However, as I have said, at T[18] of its Decision Record, the Tribunal did refer to these documents and recorded that numerous of the declarations had stated that the anonymous allegations made against the appellant were not true. The Tribunal also recorded its acceptance that the declarations and the letter of support had attested that the appellant and her husband were in a genuine, ongoing, and committed relationship. Plainly, in making these findings (at T[18]), the Tribunal had considered and understood the statements made in these documents.

23 23 After considering the matters mandated by reg 1.15A(3), the Tribunal was not satisfied that the appellant and her husband were in a spousal relationship for the purposes of s 5F of the Act. As the Tribunal put it at T[63] of its Decision Record:

63. The Tribunal has carefully considered all of the evidence and findings above, cumulatively and holistically. While it accepts that the parties provided generally consistent evidence in relation to a number of the matters referred to in r.1.15A, the Tribunal is not, on balance, satisfied [that] the evidence that supports the existence of a genuine relationship outweighs concerns it has in relation to the matter of the will and evidence of the Facebook pages. This, coupled with the lack of convincing evidence regarding the companionship and support they draw from one another leads, the Tribunal to conclude it is not satisfied that the applicant and sponsor have a mutual commitment to shared life to the exclusion of others and/or are in a genuine and continuing relationship. While it accepts that they may reside at the same address, it is not satisfied that [they] are living together in a genuine spousal relationship.

24 24 The background to the Tribunal's concerns about the will is addressed at T[52] of the Decision Record:

52. ... The Tribunal notes that the sponsor also provided a will dated in April 2014, which names the applicant as his sole beneficiary of his assets. However, the Tribunal has concerns about the validity of this document, noting it does not appear to be executed properly. The applicant's representative acknowledges as much in her response of 14 February 2019, to explain why the applicant responded in the negative when asked if she knew of a will. The Tribunal does not consider the document titled Will is a genuine valid document and therefore gives it no weight in the assessment of the relationship. It also notes that no other, valid, will has been provided.

(Footnotes omitted.)

25 25 Later, at T[61] – T[62] of the Decision Record, the Tribunal held:

61. With regards to the issue of the applicant and sponsor's responses to the question about whether the sponsor had made a will, the Tribunal considers the evidence and the applicant and sponsor's responses to this issue problematic. When asked about this topic at the hearing, they gave inconsistent responses with the applicant saying that she had no knowledge that he had made a will and did not consider he was thinking of this given he is young whereas the sponsor said he had made a will and named the applicant as beneficiary. A copy of the will was provided to the Tribunal following the hearing.
62. In response to the Tribunal's letter under s359A putting its concern about the contradictory responses on this matter, the applicant argued that the sponsor may have mentioned making a will in 2014 but that it may not be valid and that her response at the hearing was not in fact inconsistent or incorrect because to her knowledge he had not made a valid will. The Tribunal has considered this response and the evidence of their responses at [the] hearing and documents provided after the hearings. It agrees with the applicant that the copy of the will provided does not appear to have been validly executed. However, it does not find this to be a convincing or credible explanation for

the applicant's response to the Tribunal when asked about this that he had not made a will as he was still young and hadn't thought of it. In addition to their contradictory evidence, the Tribunal finds [it] concerning that the sponsor would make a will that was not properly executed and not have addressed this in the 4 years since, particularly given that he had subsequently bought and sold further properties. The Tribunal finds the fact the sponsor does not have a valid will in these circumstances where he has bought and sold real property several times does not support that they are in a genuine spousal relationship.

26 26 The Tribunal's concerns about the Facebook pages are addressed at T[59] – T[60] of the Decision Record. By way of background, the Tribunal noted that the Department's file included five pages of what appeared to be "photos" of the appellant posted on Facebook. The appellant subsequently acknowledged that the Facebook pages were hers. I have also referred to the anonymous allegations made against the appellant and her response to those allegations. The Tribunal noted (at T[16]) that, following receipt of the appellant's response, screenshots from the appellant's Facebook page, which were also in the Department's file, were annotated:

There is a notable difference in the content of the PA's Facebook profile since the natural justice letter was sent regarding the allegations.

27 27 At T[59] – T[60] of the Decision Record, the Tribunal held:

59. Included in the Department file are Facebook photos from the applicant's account obtained prior to the invitation to comment letter sent in December 2017 containing details of the allegation received that the relationship was contrived and the applicant was a lesbian. Subsequently the applicant's Facebook account was modified and pictures of the sponsor appeared. When this was put to her for comment at the hearing, and in writing subsequently under s359A, the applicant acknowledged that the Facebook pages were hers and explained that the sponsor previously did not want her to post photos of them as a couple, but after receiving the Department letter he instructed her to post pictures of them together.
60. The Tribunal has considered the evidence of the before and after Facebook pages and the applicant's response to this matter. It has considered her explanation that her Facebook page previously had no photos of her husband because he does not like social media and she uploaded photos after she was told of the allegation to disprove it and support that they are a happily married couple, however it does not find this explanation convincing or credible. While the Tribunal gives little weight to the allegation that the applicant is a lesbian, particularly as it is not based on any reliable evidence, it finds that the composition of her Facebook pages obtained by the Department before it put the allegation to her does not support that she and the sponsor are in a genuine relationship or present as a couple, and it gives this some weight in its assessment of the genuineness of the relationship in the circumstances that she has been active with her posting activity on Facebook.

28 28 As to the lack of convincing evidence regarding the companionship and support the appellant and her husband drew from each other, the Tribunal found at T[58] of the Decision Record:

58. ... The applicant was unable to say much about what she and the sponsor talk about or share together. When it was put to her that the Tribunal may have some doubts about the genuineness of the relationship given her inability to provide more details about their daily life, she said after 8 hours of work each day she is tired and they do not talk much. The Tribunal finds this response unconvincing and lacking in credibility. After 5 years of marriage and cohabitation, the Tribunal would expect a genuine married couple to be able to describe their daily routines and the nature of their particular commitment or relationship in more detail and more convincingly. Their inability to do so contributes to the Tribunal's doubts about the genuine nature of their relationship and whether it is long term and ongoing. The applicant and sponsor both referred to future plans to buy property together and have children, however, the Tribunal observes after 5 years of marriage the sponsor has bought and sold three properties together with his family members rather than the sponsor [sic], and there is no other evidence to support that they are trying to have children together or exploring any fertility issues in this regard. The Tribunal is not convinced, on the available evidence, that the applicant and sponsor's actions support their stated claims regarding a shared future.

29 29 For these reasons, the Tribunal concluded that the appellant did not meet the criteria of cl 801.221(2)(c) and affirmed the decision of the delegate not to grant the Partner (Residence) (Class BS) visa.

The Federal Circuit Court

30 30 The appellant's application for judicial review of the Tribunal's decision was based on two grounds. The first ground was that the Tribunal failed to make findings which, the appellant contended, it was required to make for the purposes of reg 1.15A(3).

31 31 The second ground was expressed as follows:

The Tribunal failed to complete the exercise of its jurisdiction in that it failed to lawfully consider nine statements and statutory declarations made by friends, relatives and colleagues of the applicant and her spouse ... in support of the applicant's application for a Partner (Residence) (Class BS) visa.

32 32 This ground was directed, specifically, to the eight declarations and letter of support noted at [15] above.

33 33 The primary judge rejected both grounds. It is not necessary for me to summarise the primary judge's findings in relation to the first ground. There is no appeal from his Honour's findings in relation to that ground of review.

34 As to the second ground, the primary judge noted the appellant's submission that the Tribunal had failed to take into account or have a genuine intellectual engagement with the statements and declarations to which she had referred. This was said to be reflected in the "limited content" of T[18] of the Decision Record.

35 The primary judge was not persuaded by this submission. He regarded it to be no more than an invitation to engage in merits review of the Tribunal's decision.

36 His Honour said that the Tribunal's reasons, in relation to the statements and declarations, must be read as a whole—not just the summary given in T[18]. The primary judge noted the Tribunal's reference to a number of the declarations at T[56] of its Decision Record when dealing with the social aspects of the relationship between the appellant and her husband.

37 The primary judge also noted that, in any event, the present case is one where the Tribunal had accepted that the evidence before it indicated that the appellant and her husband were known as a couple, and had presented as such to friends and family since their marriage. His Honour observed that this finding, in favour of the appellant, reflected on the degree to which the Tribunal was required, in its reasons, to engage with the evidence directed to this question.

38 His Honour concluded that, on a fair reading of its reasons, the Tribunal had demonstrated a genuine intellectual engagement with the whole of the appellant's claims and evidence, including the relevant statements and declarations.

THE APPEAL

The notice of appeal

39 The appellant's notice of appeal contains a single ground, expressed as follows:

The Federal Circuit Court erred in failing to find that the second respondent did not consider evidence that corroborated the first applicant's claims.

Particulars

- a) The appellant provided corroborating detailed evidence in the forms of statutory declarations of the family and friends about the relationship.
- b) The second respondent failed to engage in an active intellectual engagement with the contents of those document as is required by law.
- c) The second respondent draw [sic] inferences about the evidence provided by the first appellant but only [the] mere mention of evidence does not permit the

second respondent to draw those inferences against the appellant.

- d) The second respondent gave no evidentiary weight to the corroborating evidence.
- e) In the circumstances, the second respondent was required to specifically address and make findings in relation to the corroborating evidence, rather than mere mention of the evidence at paragraph 18 and paragraph 56 of the second respondent judgement.

There are a number of things to note about the way in which this ground was developed in the course of submissions.

First, the appellant did not place reliance on Particular (c).

Secondly, through her counsel, the appellant volunteered that it was not necessary for her to place reliance on Particular (d).

Thirdly, the appellant advanced Particulars (a), (b), and (e) as directed to a single proposition.

Fourthly, on its face, the single ground of appeal appears to be a re-agitation of the second ground of judicial review before the Federal Circuit Court—that is, directed to the eight declarations and the letter of support referred to at [13] above. It was certainly how the Minister understood the ground. However, in the course of oral submissions, it became clear that the appellant intended this ground to be directed to all the declarations and the letter of support referred to at [11] – [15] above. The Minister did not object to the ground being advanced in this way.

Fifthly, although, plainly, the focus of the various declarations and the letter of support was on the social aspects of the appellant's and her husband's relationship (reg 1.15A(3)(c)), some statements in some declarations also had relevance to the nature of their household (reg 1.15A(3)(b)) and the nature of their commitment to each other (reg 1.15A(3)(d)). This, however, was incidental to their true focus.

The appellant's submissions

The appellant does not contend that the Tribunal did not turn its mind to the four matters set out in reg 1.15A(3) of the Regulations. Nor does the appellant contend that the Tribunal was ignorant of the declarations and letter of support before it and, somehow, overlooked them.

47 47 Rather, she contends that, even though the Tribunal accepted that evidence had been provided which supported a finding that the appellant and her husband were “known as a couple and [had] presented as such to friends and family since their marriage” (T[56] of the Decision Record), and attested to the fact that they were “a genuine couple and in an ongoing and committed relationship” (T[18] of the Decision Record), the Tribunal, nonetheless, did not meaningfully engage with the declarations and did not give proper, genuine, and realistic consideration to them.

48 48 In this connection, the appellant relies on the fact that T[56] of the Decision Record does not specifically refer to the eight declarations and the letter of support (noted at [15] above) including, importantly, to the sister’s declaration. The appellant says that this declaration is particularly important because the appellant and her husband lived at the same address as the sister and her family. The substantive parts of this declaration are:

1. I am the Elder sister of Mr Phan Huu Nghia TRAN.
2. The Visa Applicant Thi Bao Ngoc PHAM is my sister in law. My brother and his wife married in 2013 and they have been living together with me since they became husband and wife.
3. I see my brother and his wife on a daily basis as the couple live at the above address with me together with my mother, husband and 4 children.
4. I am very close to my sister in law Ngoc. My brother and sister in law have a very positive relationship. They are young and have many friends - some of them have come to the home for special dinner parties.
5. They both work full time and spend their weekends usually out together with their friends. When they are at home they spend time together usually on the computer in their room watching movies. My sister in law is great with my children and helps out with the household chores together with my brother. My brother cannot cook and lucky for him his wife never hesitates to cook and prepare food for him.
6. They have similar personalities such as a great sense of humour which is what I think makes their relationship so fun and positive most of the time. They are enjoying their time as a couple and there is nothing wrong with that.
7. My brother confided in me regarding the allegations that has been made against my sister in law Ngoc and I am appalled.
8. I advise that my sister in law is not in any other relationship with any other persons except for my brother. I also state that my sister in law is NOT a lesbian. She is happily married and her relationship with her husband is strong.
9. I have seen my brother and his wife on a daily basis since they married in 2013 as they lived with me and continue to do so. They share a marital bedroom and help with the household responsibilities like any normal husband and wife.

10. I plead that the Tribunal looks at the evidence of my brother and sister in law and find that their relationship is genuine.
11. I confirm this statutory declaration has been prepared with my instructions to the Migration Agent/Solicitor and she has read this statutory declaration back to me in the Vietnamese language before signing.
12. I can confirm the content of this statutory declaration is true and accurate.

I observe that this is one of the declarations which, the Tribunal said (at T[18]), attested that the anonymous allegations made against the appellant were not true and that the appellant and her husband were a genuine couple who were in an ongoing and committed relationship.

The appellant also drew attention to her mother-in-law's declaration. Although this declaration is specifically referred to in T[56] of the Decision Record, the appellant submits that the Tribunal's discussion focuses on its concerns regarding the reliability of this evidence. The substantive parts of the declaration are:

1. I am the mother of Phan Huu Nghia Tran (Sponsor).
2. The visa applicant Thi Ngoc Bao Pham is my daughter in law.
3. My son and his wife got married on 12 October 2013. It was a happy day for the couple and also for me. I could never forget that day as I witnessed my son declare his love for his wife and seal his commitment to love and cherish somebody who loves him in return.
4. My son and daughter in law come to visit me regularly and they take me out to eat and sometimes they come over to cook for me and help me with some cleaning at my home. When I see them happy it makes me happy.
5. I feel that my daughter in law is a compatible match for my son as she looks after him very well. She is also a very good cook so I know that my son will always be eating good food.
6. I have been asking them for grandchildren when I see them but It looks like they are enjoying themselves without the responsibilities of children in the meantime and I support them in all they do so long as they are happy.
7. I love my son and daughter in law very much and I wish them a lifetime of happiness and love.

In substance, the appellant submits that the Tribunal was required to give, but did not give, active consideration to all the declarations and the letter of support because it did not discuss and make findings in relation to the contents of each document.

The appellant relies on the observation made by the Full Court in *He* (at [76]) that reg 1.15A(3):

... poses ... questions in order to ensure that the Tribunal takes into account particular circumstances of the marriage as part of the active mental process involved in giving proper, genuine and realistic consideration to the prescribed matters. The legislative intention must be that these questions will be answered, not merely thought about. ...

53 53 The appellant also relies on the decision in *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 755 (**Singh**). In that case, which also involved the application of s 5F(2) of the Act, the question was whether the Tribunal had failed to consider the oral testimony of four witnesses called on the question of the social aspects of the relationship between the visa applicant and his wife: reg 1.15A(3) (c). The Tribunal had dealt with family evidence, on the same issue, in detail. However, at best, it only touched on the oral evidence of the four witnesses.

54 54 Perram J held (at [17]):

17 It is clear that it dealt with the family evidence in detail and it is hard to see why it would take a different approach to the evidence of these four witnesses. Consequently, whilst I accept that the Tribunal must have been aware at some level of the four witnesses because of the submission which is recorded at [54] I am unable to accept that the Tribunal undertook an active intellectual process towards that evidence. Mr Karp submits that its failure to do so constitutes a jurisdictional error: *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 (*‘Carrascalao’*) at [36]-[46] per Griffiths, White and Bromwich JJ.

55 55 His Honour accepted that a jurisdictional error had been established.

56 56 The appellant also relies on the decision in *Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCCA 1879 (**Singh (FCCA)**). This case (different to the one referred to immediately above) also concerned a partner visa. The Tribunal had considered statements and statutory declarations from friends and relatives of the visa applicant and his wife and had concluded that their relationship was known to others and that they believed the relationship to be genuine. However, it was not satisfied that the visa applicant and his wife had a mutual ongoing commitment to their relationship.

57 57 In an application for judicial review, the Federal Circuit Court (at [42]) expressed concern regarding to the Tribunal’s treatment of this evidence:

42 The most troubling aspect of this case relates to the Tribunal’s treatment of the Statutory Declarations from no less than nine witnesses. These include both friends of the couple and close relatives of Ms Smith, including her mother and brother. Each of those Statutory Declarations attested to the genuineness of the relationship. The fact that this material was obtained after the initial refusal by the delegate does not of itself derogate from the

appropriateness of the weight that should be given to it. It is of concern that the Tribunal does not appear to have turned its mind that those Statutory Declarations would not have been given lightly, and cannot be dismissed lightly. If this number of people believe the relationship to be genuine, and are prepared to provide evidence in support of it, then this goes far further than the finding of the Tribunal at paragraph 21 of its decision, that “*the relationship is known to others that others believe it to be a genuine one*”.

At [45], the Federal Circuit Court held:

In the Court’s view, the Tribunal has failed to actively engage with the material before it, giving it proper, genuine and realistic consideration with respect to the matters that were under consideration. The lack of engagement with the Statutory Declarations, provided to show that the relationship was a committed one required far more than the simple statement at paragraph 21 of the Tribunal decision that, “*the relationship is known to others*”. The finding failed to grasp the detail of what was being said, the fact it was being said by a variety of people who had observed the couple over time and had no reason to provide anything but an honest assessment of what they saw and understood. Those statements went beyond the social aspects of the relationship and were supportive of a committed relationship between the applicant and his wife into the future. They were supportive of the fact that the relationship was not a sham or concocted to obtain a migration outcome for the applicant. The Court is satisfied that the overall finding was lacking in an evident and intelligible justification taking into account all the evidence that was before it. Ground one is made out.

The appellant submits that the Federal Circuit Court’s treatment of the evidence in *Singh (FCCA)* is how the primary judge should have viewed the statements and declarations in the present case.

Consideration

I am not persuaded that appealable error has been shown in the judgment under appeal.

As a general observation, each of the declarations and the letter of support is brief, and gives the declarant’s/writer’s observation and impression, expressed at a relatively high level of generality, of the appellant’s and her husband’s relationship. They include some matters of detail, but much of this is not of such consequence to require separate and explicit analysis in the Tribunal’s reasons. This is not a criticism of the declarations or the letter of support, but it is important to understand the nature and character of the evidence they provide. Further, as the Decision Record reveals, the Tribunal’s concerns arose not from the evidence of the social recognition of the appellant’s and her husband’s relationship as given by third parties, but from the evidence (or lack of it) that the appellant and her husband had, themselves, given.

62 Leaving to one side the mother-in-law's declaration and the sister's declaration (to which I will return), the other declarations and the letter of support concern, essentially, the way in which the appellant and her husband present as a couple in public settings involving friends and family. In my view, the substance of these declarations is adequately captured by the Tribunal's finding at T[18] of the Decision Record—they attest that the appellant and her husband are a genuine couple, and in an ongoing and committed relationship. Although the finding (at T[18]) was made in the context of discussing the eight declarations and the letter of support, noted at [15] above, it is tolerably clear that the Tribunal had made the same assessment with respect to the other declarations, which is captured by the Tribunal's acceptance (at T[56]) that there was evidence before it indicating that the appellant and her husband were known as a couple and had presented as such to family and friends since their marriage.

63 It was certainly open to the Tribunal to go into chapter and verse about what each declarant/writer had said (in much the same way as the appellant did in her written submissions on appeal). But it was not necessary for the Tribunal to do so, because of its acceptance of what this evidence shows. Having reached this acceptance, the reasons of the Tribunal would not have been enhanced, materially, had it descended to greater detail. I am not persuaded that the Tribunal failed to have an active intellectual engagement with this evidence.

64 I now turn to the mother-in-law's declaration and the sister's declaration, simply because, in oral submissions, the appellant placed particular emphasis on them.

65 Once again, although it was certainly open to the Tribunal to go into chapter and verse about what was said in the mother-in-law's declaration and the sister's declaration, it was not necessary for the Tribunal to do so.

66 The mother-in-law's declaration adds little of substance to the evidence addressed above. It speaks of her love for her son and the appellant; her happiness at their marriage and her memory of their wedding day; her belief that the appellant and her son are compatible; her gratitude for their visits to her and the help they provide; and her desire for grandchildren.

67 I am not persuaded that the Tribunal failed to have an active intellectual engagement with this evidence. The declaration is specifically referred to in T[56] of the Tribunal's Decision Record. The fact that, in that paragraph, the Tribunal mentioned its concerns about

the reliability of the mother-in-law's evidence strongly suggests that it *did* engage actively with what the mother-in-law had said.

68 68 The sister's declaration also adds little of substance to other evidence recorded by the Tribunal. It speaks to the fact that the appellant and her husband live with the sister, her husband, and their children—a fact about which both the appellant and her husband had given evidence. It also speaks to the fact that the appellant's mother-in-law lives in the same house, although this evidence is inconsistent with the mother-in-law's evidence about visits to her house by the appellant and her husband—an inconsistency which troubled the Tribunal. This inconsistency raised a concern for the Tribunal about the credibility and truthfulness of the claims made about the appellant's and her husband's living arrangements. The Tribunal did not resolve the inconsistency about whether the mother-in-law, on the one hand, and the appellant and her husband on the other, lived separately. Nevertheless, it appears to have accepted that the appellant and her husband lived at the same address as the sister, her husband, and their children, bearing in mind the Tribunal's findings and conclusions (at T[52]) about the financial aspects of the appellant's and husband's relationship: see also the appellant's evidence recorded at T[28] and her husband's evidence recorded at T[32] – T[33], which the Tribunal appears to have accepted.

69 69 The sister's declaration speaks to the appellant's and her husband's activities at home: the appellant and her husband share a bedroom and spend time together there watching movies; the appellant helps with chores and other household responsibilities; and the appellant cooks for her husband. This evidence is broadly consistent with the appellant's evidence recorded at T[23] and her husband's evidence recorded at T[34]. The Tribunal does not appear to have doubted that these activities took place. There was no need for the Tribunal to specifically refer to the evidence given by the sister on this score. What did concern the Tribunal was the brevity and sparseness of the evidence that was given by the appellant and her husband about their household arrangements and routines, and their relationship generally: see T[34].

70 70 The sister's declaration specifically engages with the anonymous allegations made against the appellant. It is one of the declarations specifically referred to by the Tribunal (at T[18]) that attest that the allegations were not true and that the appellant and her husband are a genuine couple in an ongoing and committed relationship.

71 Although the sister's declaration is not specifically referred to in T[56] of the Decision Record, it is specifically referred to in T[18]. It was part of the evidentiary fabric that the appellant and her husband were known as a couple and presented as such to family and friends.

72 Having regard to the Tribunal's reasons as a whole, I am not persuaded that the Tribunal failed to have an active intellectual engagement with the evidence given in the sister's declaration.

73 It is important to bear in mind that, despite what friends and family had said concerning their observations and impressions of the appellant's and her husband's relationship, the Tribunal was not persuaded that a spousal relationship, within the meaning of s 5F of the Act, existed between the appellant and her husband, for the reasons summarised in T[63] of its Decision Record. In other words, there were, in the Tribunal's view, countervailing considerations which led it to a conclusion different to the one that this evidence would suggest, absent those countervailing considerations.

74 The cases referred to by the appellant do not require a different conclusion.

75 By referring to *He*, the appellant seems to suggest that the Tribunal failed to carry out the task which the Full Court, in that case, described. In oral submissions, however, the appellant disowned that suggestion. It is clear that the Tribunal did not fail to carry out the task of examining each of the criteria specified in reg 1.15A(3). It specifically referred to *He* at T[48] of the Decision Record, noted that it was required to address each of the specific matters set out in reg 1.15A(3) (treating each as a question that must be answered), and then proceeded to carry out that task (at T[50] – T[62]).

76 The decisions in *Singh* and *Singh (FCCA)* simply turn on their own facts.

77 It is important to note the precise basis on which the appellant brings her appeal. It is that the Tribunal failed to consider particular evidence, in the sense that it did not have an active intellectual engagement with that evidence. This ground is not made out simply because, in its Decision Record, the Tribunal did not descend to the detail which, the appellant contends, it should have summarised. Similarly, it is not made out simply because the Tribunal came to a conclusion on the ultimate question before it which was at variance with the thrust of that evidence, which the Tribunal encapsulated at T[18] and T[56].

78 78 The primary judge was correct to observe that, on this aspect of her application for judicial review, the appellant was really inviting the Federal Circuit Court to undertake merits review of the Tribunal’s ultimate conclusion. I respectfully agree with the primary judge that, on a fair reading, the Tribunal’s Decision Record reflects that it had a genuine intellectual engagement with the whole of the appellant’s claims and evidence, including the relevant declarations and the letter of support. It found that the appellant and her husband represented themselves to others—friends and family—as being a married couple. It took into account the opinion of friends and acquaintances about the nature of the relationship which was, as the Tribunal summarised at T[18], and, in effect, repeated at T[56] of its Decision Record, that they were a genuine couple in an ongoing and committed relationship. This, however, was not the end of the matter so far as the Tribunal was concerned because reg 1.15A(2) requires the decision-maker to consider “all the circumstances of the relationship”. Plainly, this is what the Tribunal did.

79 79 Based on the single ground of appeal raised, no error has been demonstrated in the judgment below.

DISPOSITION

80 80 For these reasons, the appeal will be dismissed with costs.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate:

Dated: 18 January 2022